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No. 01-686

In the

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC. TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC. AND INGERSOLL PICKUP, INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE STATE OF NEW JERSEY IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

As the most densely populated state in the union, located between major metropolitan centers, New Jersey has long been a battleground over solid waste disposal. The scarcity of open space for landfill facilities, combined with a large waste-generating population, has forced New Jersey to expend tremendous government resources and energy to ensure safe and adequate disposal capacity for the waste generated by its citizens. Some of those efforts, such as New Jersey's 60 % recycling rate, have been huge successes. Others, such as its effort to preserve in-state landfill capacity for in-state generators, have not. *See*, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The legal uncertainty regarding permissible government regulation of solid waste collection and disposal has compounded the problem. After *Philadelphia v. New Jersey*, New Jersey's counties embarked on a State-mandated program to finance and build sufficient in-state capacity to dispose of New Jersey's waste. Critical to the success of this program was flow control, which guaranteed the flow of waste and revenue necessary to maintain this capacity. Flow control originally withstood legal challenge, based on a finding that the local benefits outweighed the incidential burden on commerce. *J. Filiberto Bros. Sanitation v. NJDEP*, 857 F.2d 913 (3rd Cir. 1988). However, long after over $1.5 billion in public debt had been incurred to build facilities, the Third Circuit reversed its prior ruling, based on this Court's decision in *Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994). *Atlantic Coast Demolition and Recycling v. Board of Freeholders, Atlantic County*, 48 F.3d 701 (3d Cir. 1995), *after remand*, 112 F.3d 652 (3d Cir. 1997), *cert. denied*, 522 U.S. 966 (1977). While the State and counties have been working since *Atlantic Coast* to meet the financial obligations of New Jersey's public facilities,

it now turns out that had the New Jersey counties that built their own facilities been located across the New York border, the financial crisis they face due to the decision in *Atlantic Coast* may not have occurred. *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001).

The Court below acknowledged that it was deciding an issue that had been left open by this Court in several solid waste Commerce Clause cases. The Court below also acknowledged that, "these missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement." 261 F.3d at 253. Nowhere is an answer to this open question needed more than in the State of New Jersey, where over $200 million has already been expended from the State Treasury to prevent defaults on public debt obligations and where over $1 billion in public solid waste debt remains outstanding. New Jersey thus joins the petitioner in asking this Court to resolve this open issue. New Jersey however parts with petitioner by asking the Court to uphold the decision of the Court of Appeals for the Second Circuit that the Commerce Clause does not bar local governments from assuming responsibility for managing solid waste -- an article of commerce that implicates substantial public health and environmental concerns.

STATEMENT OF FACTS

The facts of this case are set forth fully in the briefs of the parties and the decision below. *Amicus* seeks to add a brief discussion of New Jersey's solid waste system so that the Court may understand the similarities to the system upheld below.

Since the 1970's New Jersey has regulated the collection, processing and disposal of solid waste through the Solid Waste Management Act, N.J. Stat. Ann. 13:1E-1 *et seq.* ("SWMA"), and the Solid Waste Utility Control Act, N.J. Stat. Ann. 48:13A-1 *et seq.* ("SWUCA"). The SWMA requires each county to develop a comprehensive plan for the collection, transportation and disposal of all solid waste generated in the district. N.J. Stat. Ann. 13:1E-19, 13:1E-21. The New Jersey Department of Environmental Protection ("DEP") reviews and certifies each district plan to ensure its consistency with statewide solid waste management objectives, criteria and standards. N.J. Stat. Ann. 13:1E-24. Under SWUCA, all solid waste facilities in the state were designated as utilities, thus subject to rate regulation ensuring a guaranteed rate of return in exchange for agreeing to accept all waste from within their service areas. N.J. Stat. Ann. 48:13A-1 *et seq. See generally, Atlantic Coast, supra,* 48 F.3d at 705.

The need for comprehensive public management of solid waste in New Jersey arose out of a crisis in the 1970's, as the development of new, environmentally-sound disposal sites could not keep pace with the closure of old dumps and the increase in solid waste generation. *See, Southern Ocean Landfill v. Mayor & Council, Tp. of Ocean,* 64 N.J. 190, 314 A.2d 65 (1974). In addition, the Legislature's actions were prompted by New Jersey's long history of anti-competitive conduct in the solid waste industry. *See, Trade Waste Management v. Hughey,* 780 F.2d 221 (3d Cir. 1985). As

unsafe facilities within the state were closed, New Jersey became a net exporter of waste. At times, New Jersey was turned away from out-of-state landfills, as neighboring states also grappled with outdated and unsafe facilities. *Atlantic Coast, supra,* 48 F.3d at 704. Accordingly, New Jersey pressed forward with its ambitious program to reduce the amount of waste it generates through mandatory recycling and to build state-of-the-art capacity for the remainder of its waste.

The plans adopted by New Jersey's counties to manage and plan for solid waste varied. Some counties contracted with private companies to reserve space at their facilities for the amount of waste the county expected to generate over the contract period. Through the approval of county plans and state regulations, waste in those counties was then directed to the private facility. Other counties expended substantial public resources to construct incinerators, landfills and transfer stations. Once built, those publicly-owned facilities were either operated by county utility or improvement authorities or by private companies hired by the county authorities through public bidding. Waste generated within those counties was directed to these facilities through county plan approval and state regulation. *Id.* at 706-7.

Counties that chose to build facilities financed those projects through revenue bonds issued by the counties or by their utility and improvement authorities. These bonds, representing billions of dollars of public debt, were backed by the revenue assured by the guaranteed flow of waste to the publicly owned facility. *Id.* at 707. By 1990, thirteen new facilities had been built with public funds. *Id.* at 704.

After the Third Circuit determined in *Atlantic Coast* that *Carbone* invalidated New Jersey's waste flow system, each county struggled to address the new legal landscape. Those

counties that contracted with private entities for solid waste services modified their systems. Disposal contracts were either rebid in a process open to both in-state and out-of-state bidders, as permitted by the decision in *Harvey & Harvey v. Delaware Solid Waste Authority*, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 516 U.S. 1173 (1996), or waste was permitted to flow freely based on market forces or voluntary municipal contracts. *

Counties, however, that expended public funds to construct facilities could not as easily modify their systems and still pay the debt incurred. Their rates were higher than many out-of-state facilities, due to factors such as availability of open space and density of population, the inability to reject unprofitable portions of the waste stream, and various taxes and surcharges designed to pay for recycling programs and ensure the proper closure of landfills. These counties could not simply reinstitute waste flow through a non-discriminatory bidding process as the entity awarding the bid would also be one of the bidders. It was thus impossible to create the "level playing field" necessary to satisfy the Commerce Clause. *Id.* Other efforts to offset debt payments and allow these public facilities to compete economically with landfills in less populated areas also failed. *See, In the Matter of Passaic County Utilities Authority,* 164 N.J. 270 (2000).

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* Descriptions of the various county plan amendments can be found on the Department of Environmental Protection's website at *www.state.nj.us/dep/dshw/recycle/cntypus.htm* (summary only); and *www.state.nj.us/dep/dshw/recycle/admentme/index/htm* (text of plan amendments).

As a result, the State has stepped in to subsidize the debt payments of certain counties and forgive certain solid waste-related state loans in order to prevent default and the difficulties that could result for public agencies statewide that seek to raise capital. These subsidies and loans, totalling over $200 million dollars, are only a preliminary solution.* Over $1 billion in public solid waste debt remains outstanding.

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* Eligibility for these funds was contingent upon an audit of the local authority conducted by the State Treasurer to ascertain measures that could be taken to reduce the amount of subsidy needed. Copies of those audits appear on the Department of Treasury website at *www.state.nj.us/lgbr/muacpltr.htm.*

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE IMPORTANT PUBLIC ISSUE IT LEFT OPEN IN *PHILADELPHIA V. NEW JERSEY,* AND TO RESOLVE A CONFLICT IN THE CIRCUITS.

1. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) the Court barred New Jersey from restricting the ability of private landfill operators to accept and process solid waste from outside the state. Although the Court recognized the economic and environmental goals of New Jersey's prohibition, the Court found that the means of achieving them "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." *Id.* at 626-28. The Court, however, made clear that "[w]e express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources, ... or New Jersey's power to spend state funds solely on behalf of state residents and businesses." *Id.* at 627, n.6 (citations omitted).

Fourteen years later, in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), the Court applied the ruling in *Philadelphia v. New Jersey* to Michigan's solid waste management system, which prohibited private landfills from accepting waste from different counties within the State. Once again, the Court was careful to stress that the case did not "raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities. The case involves only the validity of the Waste Import Restrictions

as they apply to privately owned and operated landfills." *Id.* at 358-59. *See also, Oregon Waste Systems v. Department of Environmental Quality, State of Oregon*, 511 U.S. 93, 106, (1994) n.9 (noting that the case did not require the court to decide whether Oregon could spread the cost of solid waste management through market participation or other means not involving the regulation of private interstate commerce).

Carbone v. Town of Clarkstown, 511 U.S. 383 (1994), upon which the opponents of flow control universally rely, also involved a private facility, and thus did not directly decide the issue raised herein. The Court did, however, note that public ownership and/or subsidy would effect the legality of a flow control measure. The Court stated:

> Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility though general taxes or municipal bonds. But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State. *Id.* at 393.*

Thus, this Court has not ruled on the legality of a flow control measure where a government agency, rather than electing "to use the open market," has instead invested public funds to

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* Given this language, Petitioner is incorrect in stating that the decision below was inconsistent with *Carbone*. *Carbone* did not directly decide the issue and in *dicta* indicated that public investment was an alternative consistent with the Commerce Clause.

control solid waste management within its borders and/or build public facilities.

2. The absence of a ruling on this issue has created a quagmire for local officials seeking to ensure safe and adequate disposal of waste generated by their citizens. Contrary to Petitioner's assertions, *Carbone* has not been interpreted to require virtually automatic invalidation of flow control measures. Many Federal and State courts have permitted flow control under specific circumstances, so that the validity of these public measures literally depends on the jurisdiction in which the challenge is heard and hair-splitting distinctions between the provisions at issue.

For example, several courts have found that a government entity that enters the market as either a buyer or seller of solid waste disposal or collection services may regulate the flow of waste without violating the dormant Commerce Clause. The Courts of Appeals for the Third and Eighth Circuits have held that county and city-owned and operated landfills may bar waste from outside the jurisdiction. *Red River Service Corp. v. City of Minot, North Dakota*, 146 F.3d 583 (8th Cir. 1998); *Swin Resource Systems v. Lycoming County, Pa.*, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) The Second Circuit in the decision below, held that a county could direct waste generated by its citizens to a local facility, as long as that facility was publicly owned. *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority, supra*, 261 F.3d 245. The Third Circuit, however, found New Jersey's system of directing waste to publicly owned facilities violated the Commerce Clause. *Atlantic Coast Demolition and Recycling v. Board of Freeholders, Atlantic County, supra.*

Where the government entities are the purchasers of solid waste services, the confusion is even greater. Several Courts of Appeals have held that a government entity may award exclusive rights to collect, process or dispose of waste as long as the system for choosing the exclusive provider does not discriminate against out-of-state bidders. *Maharg, Inc. v. Van Wert Solid Waste Management District,* 249 F.3d 544 (6th Cir. 2001), *pet. cert. filed,* 70 U.S.L.W. 3291 (Oct. 10, 2001) (No. 01-615) *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d; *178 (1st Cir. 1999); Harvey & Harvey v. Delaware Solid Waste Authority, supra,* 68 F.3d 788. Others have held that regardless of the bidding process, a government entity may enter the market as a buyer of services from private companies without implicating the Commerce Clause, as long as certain criteria are met. *See, Huish Detergents, Inc. v. Warren County, Kentucky,* 214 F.3d 707 (6th Cir. 2000) (disposal ordinance and franchise agreement with private hauler unconstitutional absent expenditure of public funds); *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995), *cert. denied,* 516 U.S. 1112 (1996) (town may contract with a single private company for collection of its residents' waste and direct that company through contract to go to a particular disposal facility, but town can not use its regulatory power to force other collecters to use preferred disposal location); *USA Recycling v. Town of Babylon,* 66 F.3d 1272 (2d Cir. 1995), *cert. denied,* 517 U.S. 1135 (1996) (town may "take over" collection and disposal and eliminate private market consistent with Commerce Clause even if it imposes sanctions for violating flow control ordinance); *Barker Brothers Waste, Inc. v. Dyer County Legislative Body,* 923 F.Supp. 1042 (W.D. Tenn. 1996) (market participation exception to Commerce Clause applies to flow control ordinances only if the government entity participates in *both* the collection and the disposal market). *But see, Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority,* 814 F.Supp. 1566 (M.D. Ala. 1993), *aff'd sub nom.*

Waste Recycling v. SE AI Solid, 29 F.3d 641 (11th Cir. 1994) (market participant exception does not apply to exclusive town contract for collection that designates disposal site).

While granting *certiorari* in this case will not resolve all of the confusion in the Courts of Appeals regarding the permissible parameters of local government participation in solid waste markets, it will provide clarity in one key area that has never been resolved by this Court, *i.e.*, whether local government discriminates against interstate commerce by expending public resources to comprehensively manage solid waste and provide for its disposal at public facilities. The Court below found that such a system was not the type of protectionist measure that implicates the Commerce Clause. The Third Circuit, however, in striking down New Jersey's system, ignored the public/private distinction found determinative in this case.* Other courts have done the same, without discussion of whether public ownership of the facility effected the Commerce Clause analysis. *See, Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993);

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* The Third Circuit analyzed the issue under the "market participant" exception to the Commerce Clause, finding that exception inapplicable because the DEP's regulations constituted "market regulation," inconsistent with market participation. *Atlantic Coast, supra,* 48 F.3d 717. However, DEP does not own any solid waste facilities, and never claimed that the State itself was the participant in the market. The County co-defendants in that case, however, did own facilities and did not promulgate the regulations found to be unconstitutional in *Atlantic Coast*. The Third Circuit did not address directly whether the county authorities' ownership of solid waste facilities brought them outside the strictures of the Commerce Clause.

Coastal Carting v. Broward County, Fla., 75 F.Supp. 2d. 1350 (S.D. Fla. 1999); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. 1566 (M.D. Ala. 1993), *aff'd*, 29 F.3d 641 (11th Cir. 1994), *Cf. Southcentral Pennsylvania Waste Haulers' Association v. Bedford-Fulton-Huntingdon Solid Waste Authority*, 877 F. Supp. 935 (M.D. Pa. 1994).

This Court should grant *certiorari* to resolve this inconsistency. Furthermore, *amicus curiae* State of New Jersey urges the Court to resolve the question in favor of the Second Circuit's analysis. As the Second Circuit recognized, all of the Court's cases, including *Carbone*, focused on the local government's favoritism toward local businesses. 261 F.3d at 258. The Court cited the language in *Carbone* holding that "the town may not employ discriminatory regulation to give [the designated facility] an advantage over *rival businesses* from out-of-state," and that "states and local governments may not use their regulatory power to favor *local enterprise* by prohibiting patronage of out-of-state competitors of their facilities." *Id.* (citing 511 U.S. at 394). The Court also reviewed what it called "local processing cases," noting that even outside the solid waste context, this Court's dormant Commerce Clause cases have found "that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition." *Id.* at 261.

This interpretation is also consistent with the purposes of dormant Commerce Clause jurisprudence. As recognized by the Court below, the goal of the Commerce Clause is to prevent states from enacting measures that create advantages for in-state business at the expense of the national market, measures that amount to "economic protectionism." 261 F.3d at 261-2.

The Commerce Clause "does not prohibit all State action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis in original). The goal is to thwart "the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens...." *College Savings Bank v. Florida Prepaid Post Secondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999). The Commerce Clause was not intended, however, to prevent States or local governments from expending resources to benefit their citizens, even if it involves participating in industries that may be characterized as "commerce." Clarification of the reach of the Commerce Clause's limit on State authority is necessary to prevent the "guesswork about the constitutionality of proposed solid waste management schemes" noted by the Court below and the potential financial crises that may result if a local government makes the wrong guess.

This is particularly true where, as here, the industry directly impacts public health and welfare. As noted by Justice O'Connor in her concurrence in *Carbone*, "The Court generally defers to health and safety regulations because 'their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.' " 511 U.S. at 404 (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444, n.18 (1978)).

Thus, for example, although there are many private security firms and their business certainly constitutes "commerce," it would not be considered an economic protectionist measure for a local government to provide police

protection to all buildings and facilities within its borders. However, if the local government passed a law requiring all buildings and facilities to utilize only the locally-based private security firm, the Commerce Clause might be implicated.

Similarly, when a local government decides to expend its resources to assume the responsibility for solid waste disposal, it does not, as Justice Souter argued in his *Carbone* dissent "differentiate between all local and all out-of-town providers of a service, but instead between the one entity responsible for ensuring that the job gets done and all other enterprises, regardless of their location." *Id.* at 411. *

Surely, where public health and welfare are concerned, the Commerce Clause does not prohibit a local government from deciding that it shall be the entity that ensures "that the job gets done." The goal of that constitutional provision was not to prevent government from expending its resources to protect its citizens from the vagaries of the open market in solid waste, which may include landfill closures, illegal dumping, environmental liability, and unregulated pricing. To protect billions of dollars in public expenditures incurred in the absence of a definitive ruling on this issue, and to prevent

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* Petitioner's argument that the *Carbone* majority considered and rejected the public/private distinction because it was discussed in Justice Souter's dissent was correctly rejected by the Court below. In his dissent, Justice Souter specifically stated that the issue was "ignored" by the majority, and it does appear that there was a dispute as to whether the Clarkstown facility could be fairly characterized as public. Thus, the majority's silence on the issue can hardly be construed as a holding that public ownership bears no relevance.

continued uncertainly for public officials on this issue, the Court should grant *certiorari* and uphold the decision of the Court below.

CONCLUSION

For the foregoing reasons, *amicus curiae* State of New Jersey respectfully urges this Court to grant *certiorari* and uphold the decision below.

Respectfully submitted,

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